86-734

No.

Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROTHERY STORAGE & VAN CO., INC., *et al.*,
Petitioners,

v.

ATLAS VAN LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CASILLAS PRESS, INC. – 1717 K Street, N.W. – Washington, D.C. 20036 – 223-1220

7/14/87

QUESTIONS PRESENTED

The decision of the Court of Appeals for the District of Columbia Circuit, in review of a decision on cross motions for summary judgment, in this horizontal restraint case, raises three fundamental and important antitrust issues under Section 1 of the Sherman Act:

1. Whether the analysis of an horizontal restraint among competitors, arguably associated with a 'contract integration', must conclude with a determination of lawful purpose and effect if the combined market share of the participants in the restraint is on the order of 6-9%, notwithstanding parallel restraints by leading firms foreclosing in the aggregate over 70% of the market to the restrained competitors, and record evidence indicating anticompetitive purpose and effect;

2. If a restraint is deemed to be efficiency oriented, whether it is to be deemed lawful without any weighing of procompetitive benefits and anticompetitive drawbacks, and without any requirement that available less or least restrictive alternatives be utilized;

3. Whether an asserted free-riding justification for market restraint can be sustained on finding some arguably uncompensated benefits to one set of the contracting parties without taking into account countervailing benefits, pricing terms in the relationship, or the existence of factual dispute as to net benefits and burdens among the contracting parties.

The first and second of these issues present important questions of law regarding the interpretation of recent decisions of this Court in Broadcast Music, Inc. v. C.B.S., Inc., 441 U.S. 1 (1979); N.C.A.A. v. Board of Recents of Univ. of Oklahoma, 104 S.Ct. 2948 (1984); Northern Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 105 S.Ct. 2613 (1985); and F.T.C. v. Indiana Federation of Dentists, 476 U.S. ___, 90 L.Ed.2d 445, 106 S.Ct. ___, June 2, 1986); as well as presenting an explicit overturning of United States v. Topco Associates, 405 U.S. 596 (1972). The second and third issues raise a direct

conflict with the District of Columbia Federal Cicuit decisions and a conflict in other circuits decisional law, Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir 1984); United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1981); National Bankcard Corp v. VISA, USA, 779 F.2d 592 (11th Cir. 1986); Gen'l Leaseways v. Nat'l Driver Leasing, 744 F.2d 588 (7th Cir. 1984).

PARTIES TO THE PROCEEDINGS

Petitioners, Rothery Storage & Van Co., et al.,were appellants below on the issue presented for review. Respondent, Atlas Van Lines, Inc., was appellee below on the issues presented for review.

Rothery Storage & Van Co. certifies that the following named parties appeared in the proceedings below:

Rothery Storage & Van Co.,
Plaintiff-Appellant
A. Walecka & Son, Inc.
Plaintiff-Appellant
A & L Movers, Inc.,
Plaintiff-Dismissed;
Ace World Wide Moving of Milwaukee, Inc.
Plaintiff
Camp Curtin Transfer, Inc.
Plaintiff-Appellant
Collins Brothers Moving Corp.
Plaintiff-Dismissed;
J. Fishman & Son, Inc.
Plaintiff-Appellant
Major Van Lines, Inc.
Plaintiff
Richard Coriell & Company
Plaintiff-Appellant
Warsaw Moving & Storage, Inc.
Plaintiff-Appellant
Walker Transfer
Plaintiff-Dismissed

Allstate Moving & Storage Co.
Plaintiff-Dismissed
ABC Relocation Services, Inc.
Plaintiff-Appellant
Dobson The Mover
Plaintiff-Appellant
Needles Moving & Storage, Inc.
Plaintiff-Dismissed
Interstate Commerce Commision
Defendant-Dismissed
Chairman Reese Taylor
Defendant-Dismissed
Commissioner Frederic N. Andre
Defendant-Dismissed
Commissioner Reginald E. Gilliam
Defendant-Dismissed
Commissioner Heather J. Gradison
Defendant-Dismissed
Commissioner J.J. Simmons
Defendant-Dismissed
Commissioner Malcolm B. Sterrett
Defendant-Dismissed
Atlas Van Lines, Inc.
Defendant-Appellee

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IN THE SUPREME COURT
OF THE UNITED STATES

ROTHERY STORAGE & VAN CO., et al.

v.

ATLAS VAN LINES, INC.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Rothery Storage & Van Co., et al., by C. Jack Pearce, attorney of record, herein submits the within Petition seeking discretionary review of the issues raised here.

OPINION BELOW

The opinion of the Court of Appeals, (App. pp. 1a-45a) is officially reported at 792 F.2d. A request for rehearing en banc, was denied, on August 7, 1986. The opinion of the District Court (App. 47a-

125a) is officially reported at 597 F. Supp. 217 (D.D.C. 1984).

JURISDICTION

The judgment of the Court of Appeals (App. pp 1a-45a) was entered on June 3, 1986. The jurisdiction of the Court of Appeals was predicated upon 28 U.S.C. §1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES

Section One of the Sherman Act, 15 U.S.C. §1 (1976), provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

The Revised Interstate Commrce Act, 49 U.S.C. §10934(d), provides:

> (d) The antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to discussions or agreements between a motor common carrier providing transportation of household goods

subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and its agents (whether or not an agent is also a carrier) related solely to (1) rates for the transportation of household goods under the authority of the principal carrier, (2) accessorial, terminal, storage, or other charges for services incidental to the transportation of household goods tranported under the authority of the principal carrier; (3) allowances relating to transportation of household goods under the authority of the principal carrier, and (4) ownership of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title by an agent or membership on the board of directors of any such motor common carrier by an agent.

STATEMENT OF THE CASE

This case will determine whether the competitive potentials unleashed by transport deregulation legislation of 1980 will be curtailed by restraints imposed by interstate household goods

industry participants, involving group boycott arrangments, effectuated through networking entities known as van lines.

Prior to the passage of the Motor Carrier Act of 1980 (Pub.L. No. 96-296, 94 Stat. 793) and Household Goods Transportation Act of 1980 (Pub.L. No. 96-454, 94 Stat. 2011), interstate household goods transport was substantially cartelized by Interstate Commerce Commission regulation. Entry was limited by a required and usually expensive showing of public convenience and necessity. Prices were agreed to in rate bureaus with immunity from the antitrust laws. Those companies having interstate authority were permitted to enter into antitrust-exempted "pooling agreements" which typically contained exclusive dealing clauses limiting a moving company to affiliation with one major van line, and preventing it charging a different rate on its own

authority than its van line's rate. 1/

The 1980 reform legislation threatened this set of entry and pricing restraints. Interstate authorities became easily obtained. The firm both an interstate carrier and an "agent" for a van line (a "carrier agent", in the jargon of the trade) could now price its interstate services independently. Continuation of local-firm ownership interests in interstate, networking, "van lines" and continuation of "pooling agreements" were permitted, but the 1980 legislation made clear that moving firms represented on the van line board of directors were to limit their discussions and agreements to the rates and practices of the van line, and not to enter into agreements

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1/ Pooling agreements typically waived exclusive dealing and price restrictions as to shipments by the U.S. government, a buyer sufficiently far sighted and sizable to discourage such restraints on its shipments.

restraining their own independent rates and services. 49 U.S.C. 10934(d) Remnants of the cartelization period remained, however. These included a pervasive set of exclusive dealing arrangements detailed later.

The household goods transport sector rests on a base of independently owned and identified, largely localized moving firms, typically conducting local, intrastate and interstate operations. Such moving and storage firms typically conduct their own advertizing and direct sales efforts; pack, load and warehouse the goods; transport the goods in a truck owned or contracted from an owner operator; and either deliver the goods or arrange with a distant firm like their own for delivery. Some such companies have come to have several branches and are regional or even national scope: most remain one town or one city businesses.

To terminate a shipment far distant from its base, and to load its truck for subsequent movement, such a localized moving and storage company needs the cooperation of a distant moving firm. The litigants agreed that ready access to numerous, dispersed distant moving firms is essential to successful interstate operation. (PSF III - A)2/ Over time, organizations named "van lines" were created to mediate and simplify long-

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2/ Abbreviations used hereafter are as follows: PSF=Plaintiffs' proposed statement of material undisputed facts; DSF= Defendant's proposed statement of material undisputed facts; DRPF = Defendant's Response to Plaintiffs' Facts; PSGI= Plaintiffs' Statement of Genuine Issues. Defendant did not dispute most of the Plaintiffs' proposed fact statements. Therefore, wherever a PSF designation is used in the text, that statement is undisputed unless otherwise noted. Where Plaintiffs introduced evidence not included in an undisputed fact statement, that evidence is specifically referred to, often with reference to whether the Plaintiffs understand it to be uncontradicted. Defendant's proposed, frequently long, fact statements were usually disputed at least in part. Comments

distance interactions between the local firms. At least three of the six leading van lines were created and initially owned by the localized moving firms themselves (Allied, United Van Lines and Atlas). The van line essentially coordinates movements among the contractually affiliated moving and storage firms, collects and distributes revenues for completed shipments to the participating firms while retaining a portion for its coordinating service, and furnishes a national network name which each affiliated company can sell in addition to its own local identity. (PSF II-D, V-D) These services are supplemented by offers of driver training and sales supplies. Very limited national advertising is provided, at least in the case

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concerning defendant's fact statements are referenced to plaintiffs' statement of genuine issues, to permit examination of areas of agreement and disagreement.

of Atlas. When a shipment moves on van line registry the van line assumes final carrier responsibility to the shipper (PSF V-D) (though it can and usually does demand indemnity for claims from the moving firm(s) originating or otherwise handling the shipment).

According to Interstate Commerce Commission statistics about 80% of the longer haul interstate household goods shipments move on the registry of just six major van lines. However, when not precluded by regulatory barrier or contract stipulation, the local moving company has had the choice of relying entirely on itself and known industry contacts, or using brokers, to manage its shipment and equipment to and from distant points.

The van lines thus were created to provide a complementary service to localized moving firms. Van lines and

"agent" firms have a contractually codified mutual interest, and thus a joint interest in the success of their contract integration (including, on occasion, a joint interest in suppressing parallel competition).

The "van line" service is indisputably useful. However, its competitive merit has not as yet been tested against independent operations, brokerage-mediated networking, or new networking entities having access to the market unimpeded by regulatory restraint and the private restraints later detailed.

This industry composition allows potential for several horizontal competitive relationships. Moving and storage firms are often competitors of each other as to local and intrastate movements, not involving either van lines or distant mover connections. Moving firms have been competitors for interstate business which

they commit to and move within the van line framework. And each such firm has been an actual or potential competitor to any van line servicing it (and thus also with with those "agents" cooperating with the van line), to the extent it had the capacity and desire to manage interstate moves on its own or in cooperation with firms other than the van line. All these competitive relationships were stipulated in this record. (E.g. PSF V-G, V-K.)

Because the bulk of the intercity household goods business is generated by the local moving firms, exclusive dealing and other van line mediated restraints on those firms affect the bulk of the revenues involved in the interstate trade. Restraints on those "carrier agents" which at the time of the 1980 partial deregulation were conducting some independent interstate carrier operations targeted that subset of the moving trade

which was most visibly capable of initiating new alternatives to those van line operations which were in place in 1980; whether by direct independent operations, working through brokers or creating new networking entities.

Atlas was created in the 1940's by "carrier agents," and enjoyed its major growth as an agent and carrier-agent owned corporation until a public offering of its stock in 1980. Entering the 1980's, carrier agents constituted about 20% of Atlas' 490+ affiliates. According to Atlas' data, these carrier-agents contributed a disproportionately high 35% of the revenues and hauling capacity committed to Atlas. (PSF II-J, DRPF II-J).

Until 1982, Atlas and the "carrier agents" had on file with the Interstate Commerce Commission an approved pooling agreement which contained the usual ex-

clusive dealing clause but did not restrict carrier agents independently accessing other firms associated with Atlas.

At all relevant times a majority of Atlas' Board of Directors were owners of local or regional moving and storage firms.

The firms represented in Atlas' Board of Directors, all veterans of the era of regulatory cartelization, reacted to the 1980 "deregulation" legislation with apparent alarm. In 1979, as entry became de facto easier in anticipation of passage of the long-pending legislation, Atlas' Board issued a directive prohibiting any affiliated firm "acquir(ing) any new interstate authority or apply(ing) to add to his present interstate authority". Atlas was to enforce this edict by refusing to handle shipments to and from other affiliated firms within the geogra-

phic scope of any authority which might be acquired. (PSF V-A, V-B). (Some affiliated firms did and some did not challenge this policy by acquiring interstate operating authorities. Atlas apparently did not actively enforce it.)

In 1980, Atlas' Board announced but quickly abandoned a plan to buy all the interstate operating authorities of all contractually affiliated firms. (PSF V-F) In 1981 the Atlas Board of Directors announced a policy which would have forbidden (1) any "carrier agent" access to any other firm affiliated with Atlas for the purpose of terminating shipments or originating backhauls, and (2) mixing on one vehicle the "carrier agent's" shipments with those on Atlas registry. (PSF VI-G, VI-H) Atlas suspended this policy after the Interstate Commerce Commission sued (PSF V-I), alleging that such changes in Atlas' contracts constituted

an unauthorized, anticompetitive modification of the approved "pooling agreement" between Atlas and its "carrier agents."

The Atlas Board's 1982 initiative effectuated the essentials of the 1981 program but avoided regulatory review. All affiliated "carrier agents" were required to spin off their interstate carrier operations into a separate firm with a new name, while dedicating their existing names, commercial reputations and goodwill entirely to Atlas. Such spun off carriers would be denied access to all of the 490+ moving and storage firms which were under contract to Atlas, for backhaul generation (in substance, for all but incidental and occasional services). The newly bifurcated affiliates could not use one truck efficiently to haul independent carrier and Atlas-registered shipments. Atlas re-

quired all affiliated "agents" to deny services to the carrier-agents' carrier operations and launched a program seeking the explicit agreement of all the 94 "carrier-agents" with the program. (PSF VI-N through VI-R) After the Interstate Commerce Commission declined jurisdiction over this program (Atlas Van Lines, Inc. - Pooling, No. MC-F-14784 (Declaratory Order, Feb. 17, 1983), the Petitioners, with other firms named herein, initiated this antitrust action.

In deposition and document discovery, Petitioners established the following additional facts relevant to the rationale of the Court of Appeals' decision. The Atlas Board's carrier agent policies precursor to the 1982 policy had as a principal motivation fear of loss of revenue to the Atlas assemblage from previously localized moving firms using new market freedoms to ini-

tiate more independent and competitive operations. (PSF VI-V) The 1982 carrier agent policy was initiated in the context of Atlas Board members' fear that after passage of the 1980 "deregulation" legislation "agents" would proliferate independent, price competitive operations (PSF VI-W).3/

A group of six major van lines control through contracts with local and regional moving and storage firms over 80% of the business handled by the 15

3/ The concern of Atlas' Directors with the prospect of additional price competition was amply evidenced throughout the record. E.g., in deposition review of notes director John Westerberg made during Board of Directors formation of the Atlas carrier-agent policies:

> Q: This note "Agents won't be able to file lesser rates," was that a concern which you were addressing?
>
> A: It was a major concern.

John Westerberg Deposition, September 27, 1983, p. 38.

largest interstate movers (PSF, App. F). Petitioners proposed that these and other data not disputed by Defendants (PSF III-H) established a long-haul intercity market which these major van lines dominate.

Petitioners and defendant jointly introduced evidence concerning the exclusive dealing and "carrier agent" policies of the leading van lines other than Atlas. (PSF, App. G) Petitioners assert that these data show (1) that five of these six leading van lines have all their affiliated moving and storage firms, or agents, under exclusive dealing contracts which bar those affiliates from cooperating substantially with the carrier operations of the carrier agents, and (2) in addition five of the six major van lines had in place or in initial stages "carrier agent" policies similar to Atlas', likely to curtail the indepen-

dent competitive operations of firms then associated with them and any of the petitioner firms which might consider affiliating with them.

This evidence, along with market shares, is summarized in the following table taken from PSF, App. F, G. The market shares are stipulated between Petitioners and defendant Atlas. The designations "EA" and "CAR" represent, respectively, exclusive agency requirements and present or proposed restrictions on the use of carrier agent authorities.

		Share of Revenues of 15 Largest Carriers	
1.	Allied Van Lines, Inc.	18.9%	EA, CAR
2.	North American Van Lines, Inc.	18.5	EA, CAR
3.	United Van Lines, Inc.	16.2	EA, CAR
4.	Aero-Mayflower Transit Co.	12.0	EA, CAR
5.	Bekins Van Lines Co.	9.6	
6.	Atlas Van Lines, Inc.	8.3	EA, CAR

7.	Global Van Lines, Inc.	4.5
8.	Burnham Van Services, Inc.	2.8
9.	Wheaton Van Lines, Inc.	2.6
10.	American Red Ball Transit	1.7
11.	Neptune World Wide Transit	1.5
12.	National Van Lines, Inc.	1.1
13.	Pan American Van Lines, Inc.	0.8
14.	Cartwright Van Lines, Inc.	0.7
15.	Interstate Van Lines, Inc.	0.6

Petitioners also introduced evidence that the leading van lines closely monitor each others' competitive actions, facilitating parallelism 4/ and that Atlas Board members were well aware that curtailing the access of the carrier agent firms to distant connections would, in this industry context, be extremely detrimental to any effort to continue

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4/ (E.g. a United Van Lines study of the six firms considered competitors was reproduced and distributed to senior Atlas management by Atlas President, PSF, App. G., pl. doc. nos. 001076-001104.)

competitive carrier operations. E.g. the notes of Director Westerberg in preparation for a Board decision on one of the versions of the carrier agent policy:

> If you are still concerned about AVL losing business and being destroyed by freedom of entry of agents getting authority simply restrict any agent operating on his own authority from using any AVL agent for terminal services. That will handle the problem very quickly. Westerberg Dep., Ex. 5 at 6.

Petitioners uncontradicted evidence showed that the Atlas Board and Officers knew that reserving to Atlas the use of the established local market identities of the affiliated moving and storage firms would afford to Atlas (and deny to competitive carrier operations) a major marketing advantage. E.g. statement of Atlas President Bland at May 19, 1982 Board meeting with protesting carrier agents, as to why Atlas insisted on exclusive use of the local firms' local market identities:

> One of the things, while some of you may think we have lost sight of this, one of the things we haven't lost sight of is the fact that people call Bluff City, for the most part. They don't call Atlas Van Lines. Sure there is a brand name identity and there is a brand name identification, but they really call Bluff City....Primarily, in your community, you are the people in the public's eye. (Transcript, p. 28)

Defendant's evidence showed that 20 of the 94 "carrier agents" -- over 20% -- addressed by the 1982 carrier agent policy ceased independent interstate carrier operations consequent to implementation of that policy (DSF 82). 5/

Relevant to the "free riding" issue, Defendant admitted that "Atlas' own personnel do not book shipments" and the direct sales efforts of the "agents" generate business, such as prized

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5/ Defendant did not dispute that one firm accounting for about 8% of Atlas total revenues avoided any use of its independent authority from the date of the first Atlas carrier agent policy announcement in 1979, for fear of termination. (Steiner Dep. 6-8).

"national account" business (PSGI 5, 86, 87, first sentence); "Almost all hauling is done by agents" (PSGI 6); and Atlas owned about 25 vehicles whereas agents owned (and operated) about 5,000 vehicles (PSGI 7). Defendant Atlas recognized that "Agents perform the services of booking and hauling shipments in agency-owned equipment." Agents also provide origin and destination services. (PSGI 4, p. 10).

Petitioners established that "Each plaintiff owns its own office and warehouse facilities and equipment" (PSF I-D), and that plaintiffs pay their own costs of maintaining their equipment and facilities, save for noted minor exceptions such as an Atlas small contribution to a group advertising program and contribution to the agent's cost of painting agent-owned trucks with the Atlas logo and colors. (PSF V-C) Petitioners also

established by deposition of an Atlas Director that when "carrier agents" operate on their own authority they do not use the Atlas administrative network -- they make their own arrangements for connecting with other moving and storage firms, using the services of those firms, and the like. (Shetler, Dep. 79-81) 6/

Petitioners showed that Atlas provided services to affiliated firms in exchange for an elaborately articulated service charge or commission. 7/ and Petitioners' affidavits indicated that

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6/ Given that Mr. Shetler's statement negates direct free riding, Atlas appears to claim that an independent interstate carrier's making an independent contact and contract with an independently-owned moving firm, without using Atlas' dispatchers, payment system, or other services, is somehow a use of Atlas' system, in the sense of using assets owned by Atlas. This is a non sequiter.

7/ Atlas charges were set out in the "Operating By-laws and Rules and Regulations," supplemented by a "Finance and Accounting Information Manual" and periodic bulletins.

Atlas charged specifically for ancillary services such as sales aids and driver training. (Affidavits of Coriell, Terry and Fisher, PSGI).

Further as to claimed justifications for the Atlas carrier agent policies, Petitioners'uncontradicted analysis of Atlas' records showed that Atlas had sustained virtually no monetary loss on claims arising from independent carrier operations of agent firms in a preceeding four year period. 8/

The Atlas Board members had not developed or received any data showing any increase in customer confusion resultant from increased carrier operations of carrier agents, or any decrease in equipment availability to Atlas resultant from

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8/ Affidavit of Janet Pearce, attached to Plaintiffs' Reply to Defendants Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment as to Liability.

EDITOR'S NOTE

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(1959), and United States v. Parke, Davis & Co. 362 U.S. 29 (1960). Petitioners also urged that the facts satisfied recently articulated criteria for application of the per se rule in such cases as Broadcast Music, Inc. v. Columbia Broadcasting Systems, 441 U.S. 1 (1979); N.C.A.A. v. Board of Regents of Univ. of Oklahoma, 104 S.Ct. 2948 (1984); Northern Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S.Ct. 2613 (1985); and Smith v. Pro Football, Inc. 593 F.2d 942 (D.C. Cir. 1978).

Alternatively, petitioners urged the illegality of the restraints under the more extended rule of reason analysis. The restraints evolved from a consciously designed, persistent series of efforts to foreclose market access. Widespread exclusive dealing clauses already substantially impeding market entry. Parallel development of "carrier agent" restraints

by other major van lines further closed off market options. Anticompetitive effect was apparent in the immediate elimination of one fifth of the competitive carrier operations, as well as inhibition of the development of competitive operations by some firms throughout the 1979-82 period. Support for claimed trademark protection and consumer exposure propositions was lacking. There was no undisputed evidence of any net "free rider" effect, taking into account all benefits and burdens to contracting parties. Less restrictive alternatives to satisfy any of claimed legitimate commercial goals were apparent.

The petitioners urged that the restraints have clear output limiting tendencies. They prevent the free and flexible connections between the affected "carrier agents" and other household goods moving firms in the nation. They

restrict the flexible and efficient use of equipment. They prevent the use of local and regional market identities built up over time, at owner's expense, to attract consumers to potentially more efficient alternatives to existing van line services. All this tends to decrease the effectiveness of price competition and limit service options. And all these effects are contrary to the thrust of the 1980 legislation and the policy of the antitrust laws.

The District Court (Judge Oberdorfer) ruled for the defendants on cross motions for summary judgment, on grounds only partly relevant to the rationale of the Court of Appeals. 10/

10/ The District Court held that the agreement among household goods moving firms and Atlas officials on the Atlas Board of Directors constituted an intracorporate conspiracy exempted under Copperweld Corp. v. Independence Tube Corp, ___ U.S. ___, 104 S.Ct. 2731, 81 L.Ed.2 628 (1984) (App. 81a-96a) or

On appeal, Petitioners pointed out, inter alia, a variety of factual and legal errors. 11/

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alternatively that 49 U.S.C. § 10934 (d) exempted from the antitrust laws agreements between "agent" firms on a van line board of directors even when such agreements restricted the competitive carrier operations of the carrier agents on the board and other actual and potential carrier agents (App. 81a-89a, 96a-97a); that exclusive dealing contracts were essential to van line operations (App. 59a-60a); that the various incidents of the 1982 carrier agent policy were justified by a need to terminate "free riding" by carrier agents on Atlas (including assumed use of Atlas personnel and equipment in independent carrier operations) (App. 57a, 114a-115a) and by a need to avoid additional Atlas exposure to claims arising from independent carrier operations of carrier agents (App. 123a); that the restrictions on "carrier agent" competition were justified by a presumed gain in the vigor of competition among van lines (App. 122a-123a); and that since Atlas had the legal right to set up company stores which had no independent carrier operations and also would deal with no independent carriers, it was justified in requiring all independent firms contractually associated with it to abide by similar or less restrictive conditions (App. 118a-122a).

11/ E.g., the lack of any record support for the proposition that exclusive dealing contracts were essential for

The Court of Appeals corrected several District Court errors. In particular, it recognized the horizontal competitive relationships between the Atlas Board members, between those firms and other carrier agents, and between Atlas and the carrier operations of carrier agent firms. (App. 8a-9a). The Court of Appeals recognized that the Atlas/Board combination was an horizontal conspiracy, which used a group boycott mechanism to effectuate the restraints it devised. (App. 9a)

The appellate panel rejected use of the per se rule, and held the restraints lawful under the rule of reason on the

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van line operations, the lack of any factual, much less undisputed, basis for asserting that van line competition would be be made more keen by diminishing com petition from other, non-van line sources, and the Court's failure to reflect an Atlas Director's testimony specifically indicating that carrier agents did not use Atlas personnel and coordinating services in their independent operations.

basis that with an estimated market share of 6% (one of two alternative undisputed national market shares which the Opinion adopted without explanation), Atlas and its Directors could not restrict output, and therefore must have had some purpose other than competitive restraint. (App. 1a, 22a).

The Court of Appeals took no account of the prior-noted evidence concerning explicit motivations of the Atlas' Board market foreclosure effort, parallel exclusive dealing and "carrier-agent" policies, and loss of competitive carrier agent operations.

The Court of Appeals found one single, and in its opinion sufficient, justification for the carrier agent policy: termination of "free riding" by carrier agents. (App. 24a-25a), on bases detailed later herein.

To these two basic premises the

Circuit Court added a reinterpretation of Supreme Court precedent concerning horizontal restraints. It concluded that the Supreme Court had impliedly overruled United States v. Sealy Corp., 388 U.S. 350 (1967) and Topco Associates, Inc. v. United States, 405 U.S. 596 (1972) and had returned to the analysis of United States v. Addyston Pipe & Steel Co., 85 F.2d 271 (6th Cir. 1890; modified and aff'd 175 U.S. 211 (1899), as to restraints "ancillary" to a "contract integration". In the Court of Appeals' view the Supreme Court now is of the view that as to "ancillary" restraints there need be no weighing of procompetitive and anticompetitive effects. (App. 40a) The Court of Appeals' reasoning also precludes any search for less restrictive alternatives to any such restraint.

The plaintiffs petitioned for a rehearing en banc on July 3, 1986. The

petition did not get a majority vote, as indicated by order of August 7, 1986.

REASONS FOR GRANTING THE WRIT

1. A RULE THAT HORIZONTAL RESTRAINTS AMONG PARTIES HAVING LESS THAN A 10% MARKET SHARE CANNOT ADVERSELY AFFECT COMPETITION AND NO CONSIDERATION IS TO BE GIVEN TO OTHER MARKET CONDITIONS, PURPOSES OR APPARENT EFFECT, PRECLUDES PROPER APPLICATION OF BOTH THE PER SE RULE AND THE RULE OF REASON

The Court of Appeals properly held that the competitors on the board of directors of a common instrumentality had effected horizontal restraints on competition (App. 8a-9a) in creating Atlas' carrier-agent policies; and the restraints were given effect throughout the "Atlas system" (the moving firms under contract with Atlas) by requiring those firms to boycott any firm refusing to comply with the Atlas policy, and all the reorganized carrier operations (App.

9a). The Court's sole ground for finding a lack of any anticompetitive purpose or effect in these horizontal restraints is its assertion that "it is impossible to believe that an agreement to eliminate competition within a group of that size can produce any of the evils of monopoly" (App. 14a). The court reasoned that if a linked group of companies making up 6% of the market were to reduce their output, firms in the remaining 94% of the market would simply take over the abandoned business. (App. 14a). Apparently assuming that the restraints' proponents believed this proposition, the Court assumed that they must have had objectives other than restraint of competition

> "If it is clear that Atlas and its agents by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more efficient. No third possibiity suggests itself." (App. 22a).

On this basis the court concluded

that the "carrier-agent" restraints must have a procompetitive purpose and effect, and in the words of Chief Judge Wald's separate statement, warrant a determination of "per se legality" (Wald Statement, App. 42a, n. 2).

Precedent requires that a court first determine whether an allegedly illegal practice "...facially appears to be one that would always or almost always tend to restrict competition and decrease output...BMI, supra, at 19; and "...so often 'lack ...any redeeming virtue ... that they are conclusively presumed illegal..." BMI, supra, at 8. If this is found the practice is deemed illegal per se. Price fixing agreements and territorial allocations have historically been so treated. E.g., Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982), Topco, supra.

After a period in which this Court

treated a wide variety of group boycotts as per se unlawful (e.g., Eastern States Retail Lumber Ass'n. v. United States, 234 U.S. 600, 34 LS.Ct. 951, 58 L.Ed. 1490 (1914), Associated Press, Klors, Fashion Originators, supra) this and lower courts have sought to differentiate between collective refusals to deal apparently targeting competition or otherwise clearly likely unreasonably to retrain competition, and those which might be related to productive undertaking in such a way as to require more discriminating analyses under the rule of reason. Courts have continued to hold per se unlawful any " ... concerted attempt by a group of competitors to protect themselves from competition from non-group members who seek to compete at that level by depriv(ing) would-be competitors of a trade relationship which they need to enter (or survive in) the level

where the group operates." Smith v. Pro Football, 593 F.2d 1173, 1178 (D.C. Cir. 1978). A similar standard was adopted by this Court in Northern Wholesale Stationery, supra, when it stated that the per se rule applies to group boycotts denying "access to a supply, facility, or market necessary to enable the boycotted firm to compete..." (at 2619)). See for a reasonably discriminate discussion of categories of group boycott activities E.A. McQuade Tours, Inc. v. Consolidated Tour Manual Committee, 467 F.2d 178, 186, 187 (5th Cir. 1972).

Both the presence of market power and apparent foreclosure of price and product offers have been used as discriminators in determining the applicability of the per se rule. As stated in NCAA: "As a matter of law, the absence of proof of market power does not justify a naked

restraint on price or output" (at 109). On the other hand, the apparent existence and use of market power is an obvious indication of anticompetitive purpose and effect.

If the per se rule is not applied and a rule of reason analysis is required "...the fact finder weighs all the circumstances of the case...(including) the facts peculiar to the business in which the restraint was imposed, the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist ... the purpose and end sought... Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 333 U.S. 36, 49 (1976). See also Nat. Soc. Professional Enginers v. United States, 435 U.S. 679, 692 (1978) "...competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons

why it was imposed."

In this inquiry, the courts are to "focus directly on the restraint's impact on competitive conditions." Professional Engineers, supra at 188.

In both per se and rule of reason analyses, the Court historically has not been solely concerned with whether monopolization was imminent, but rather has inquired whether the examined restraints "deprive the public of the advantages which flow from free competition." Fashion Originators Guild, at 486. (See also Judge Stevens' observation in B.M.I., "It is often the case that an agreement among competitors will not serve to eliminate competition forever, but only to delay the appearance, or to increase the costs of new entry." (B.M.I., supra, at 36).

Thus in horizontal restraint cases, there has generally been no requirement

of proof of monopoly position or iminent danger of such. Rather, as indicated this year by this Court in Federal Trade Commission v. Indiana Federation of Dentists, CCH Trade Cases 1986-1, ¶ 67, 117, 476 U.S.____ 90 L.Ed.2d 445, 106 S.Ct. ___ (June 2, 1986), a group boycott among competitors should be struck down under the rule of reason without any specific showing of market share or market power if an anticompetitive purpose is apparent and there is visible interference with independent offer and acceptance of terms of sale, accompanied by little procompetitive justification. Likewise, in NCAA, this Court made no market share findings, but could discern a clear collective limitation on the available range of price and supply options. Some lower courts have taken the same approach. See General Leaseways v. National Driver Leasing, 744 F.2d 588 (7th Cir. 1984),

where the circuit court found several forms of competition with a nationally integrated network of truck leasing firms, determined no specific market share for it, and went on to observe, in striking down a territorial allocation, "the association, with all the competition it does face, is not a powerful cartel" (at 597) but "it does have the power to restrain trade substantially" (at 596).

In this case, the Court of Appeals pivoted its decision on a market power analysis based solely on the market share of the immediate participants in the restraint -- Atlas, the "agent" and the "carrier-agent" firms. In asessing market power the court failed to take into account the parallel use of exclusive dealing clases by other major van lines, a practice adopted by these lines in a period of cartelization prior to the

1980 deregulation legislation. Nor did it consider the parallel "carrier-agent" restraints which promised to shut off access within other van line groupings of "agent" firms.

The parallel use of such similar restraints foreclosed the bulk of the interstate market to those under contract with Atlas and raised entry barriers to those who might initiate competition with Atlas and other major van lines. Parallel use of such restraints also facilitates collusion among major van lines. Thus the presence of these similar restraints was the source of Atlas' power in the market. Failure to take them into account is inconsistent with this Court's decision in Standard Oil v. United States, 337 U.S. 293 (1949). See also United States Department of Justice, Vertical Restraints Guidelines, §§ 3.2, 3.3 (1985), reprinted

in 5 CCH Trade Reg. Rep. ¶ 50, 473. The Court of Appeals gave no weight to the cumulative effect of these restraints. The Court's mode of analysis also excluded from view the many indications of anticompetitive purpose and effect apparent in this record, recited earlier in this Petition,12/

Courts have in recent years increasingly referred to the formal arguments of the economic discipline. This generally healthy development can be

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12/ These indications of anticompetitive purpose and effect included the obvious desire of the movers on Atlas' Board to fend off increased competition resulting from the legislative reduction of restraints on entry, their explicit fear of increased price competition, the Board's experimentation with several approaches to forfend increased competition, their apparent trade-derived knowledge that foreclosing access to those distant competitions not already foreclosed by other van liens exclusive dealing clauses would have substantail coercive effect, and the prompt sacrifice of any competitive operations by one fifth of the carrier agent firms targeted.

harmful when these powerful analytic tools are misused, or extended beyond their current capabilities. The Court of Appeals truncated form of market analysis would powerfully and pervasively limit the reach of the antitrust laws. If no acount is to be taken of surrounding market conditions when the direct participants in and victims of a restraint have less than a monopoly-threatening market share among themselves, antitrust analysis will undoubtedly be simplified. But the way will be open for competitors to exercise their ingenuity to create a host of market deadening accords.

The mode of analysis adopted in this case conflicts sharply with the approaches adopted in Indiana Dentists, and NCAA, supra and a recent important Seventh Circuit case, General Leaseways, supra. These conflicts require authoritative resolution.

This Court's review is also appropriate because the stark presumption of lawfullness adopted below, in precluding any consideration of anticompetitive effects, also fails to require examination or less-restrictive alternatives, as noted below.

2. THE COURT OF APPEALS OPINION PURPORTS TO OVERRULE ESTABLISHED RULE OF REASON REQUIREMENTS THAT A RESTRAINT'S PROCOMPETITIVE AND ANTICOMPETITIVE EFFECTS BE WEIGHED, AND LEAST RESTRICTIVE ALTERNATIVES BE UTILIZED.

In holding that BMI, NCAA and Northern Stationery have overruled Topco and Sealy, supra the Court of Appeals constructed a form of ancillary restraint analysis inconsistent with this Court's prior holdings, and well settled law concerning the necessity of constraining anticompetitive accords to the minimum dimensions reasonably necessary for productive economic undertakings.

As early as 1873, this Court stated

as to claimed "ancillary" restraints "... the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made." Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 66, 67 (1873). In Addyston, Judge Taft repeated that for a competition-limiting restraint to be upheld it must be found "reasonably necessary" to the legitimate economic integration presented (at 281).

Inherent in this logic, and central to it, is recognition that a restraint is not "reasonably necessary" if the same end can be secured through less restrictive means. This logic has evolved into well recognized "least restrictive alternative" analyses, perhaps best recently summarized by Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1494-95 (D.C. Cir. 1984) to the effect that when legitimate commercial

objectives are advanced to justify a restraint of competition " ... it must be shown that the means chosen to achieve that end are the least restrictive available." See also United States v. Realty Multi-List, Inc. 629 F.2d 1351, 1375 (5th Cir 1981). See generally VII Areeda, Antitrust Law § 1505 (1981).

Allied to this is the requirement that when a restraint has procompetitive justification. "... the anticompetitive role of the challenged practice must be carefully balanced aginst its 'procompetitive virtue' to ascertain whether the former outweigh the latter." Smith v. Pro Football, Inc., supra, at 1178. See also National Bancard Corp v. Visa USA, 779 F.2d 592, 601, 603,(11th Cir 1986).

The Court of Appeals decision is not in accord with these decisions. The Court of Appeals reasoned that an "agreement (among competitors) eliminating com-

petition ... subordinate and collateral to a separate, legitimate transaction in the sense that it serves to make the main transaction more effective" (App. 29a) is to be deemed an "ancillary" restraint. It then notes that the territorial allocations in Topco could be considered subordinate and collateral to the creation of the private label brands there created, and could therefore have been considered ancillary restraints (App. 31a), but were nonetheless struck down as per se illegal (App. 30a-32a). The Court concluded that if Topco is now the law, the Atlas restraints are per se illegal. (App. 32a)

The Court of Appeals avoided that result by determining that B.M.I., supra, overrules Topco, supra. Noting that in BMI, horizontal price restraints were related to creating a group licensing mechanism, it excerpted that portion of

the BMI opinion which states "We would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be a per se violation of the Sherman Act."

The Court then sought to draw a parallell to the instant case.

> "Atlas is not in a position to conduct all of the carriage involved itself. The restraints it imposes are reasonably necessary to the business it is authorized to conduct. One may quibble about whether the ASCAP blanket license is more necessary to the conduct of that business than the agent exclusivity arrangement is to the conduct of Atlas' business. We do not believe, however, that in choosing the words it did, the Supreme Court intended that the lower courts should calibrate degrees of reasonable necessity". (App 36a).12/

12/ The Court imputed "redeeming competitive virtures" to the major van lines' parallel use of exclusive dealing clauses from the fact that such practices are customary (App. 34a); and from a Senate report's explaining Congressional refusal to grant antitrust immunity to exclusive dealing contracts on the basis that the antitrust laws do not (necessarily or automatically) condemn such contracts.

Thus, in the view of this Court of Appeals, if a restraint is arguably "reasonably necessary" to a contract integration, this Supreme Court has held that the courts are not to examine degrees of necessity, or alternative means of addressing any legitimate goals.13/ Nor, as the Court of Appeals explains, should courts consider whether

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The Court took no cognizance of the fact that such arrangements were entered into in a period of regulatory cartelization, where they complemented collective pricing and various regulatory rules in a concerted suppression of competition. Nor did the Court consider the cumulative effect of these restraints in limiting market access and raising entry costs in the post-1980 era. And the Court did not examine the interaction of such contracts and the additional restraints imposed in the Atlas Board's "carrier-agent policy."

13/ Though the Court of Appeals began this portion of its opinion with a recital of language to the effect that restraints may not be unnecessarily broad (App. 29a), in following the line of logic traced above it undertook no analysis of whether Atlas' carrier agent policy was unnecessarily broad, and as noted above ended in rejecting such an analysis.

procompetitive effects are more than offset by anticompetitive effects.

> "Second, though it is sometimes said that, in the case of restraints like these, it is necessary to weigh procompetitive effects against anticompetitive effects, we do not think that is a usable formula if it implies an ability to quantify the two effects and compare the values found. ... If the underlying contract integration is lawful, i.e. not of such a size as to violate the Sherman Act, restraints ancillary to the integration, in the sense we have described, should be lawful". (App. 40a, n. 11).

The Circuit Court has turned BMI on its head. In BMI the Court considered a joint marketing, or common agency, device which had greatly reduced the cost of mass marketing musical compositions. The majority there apparently believed some unification of pricing within the marketing mechanism was necessary. The joint marketing mechanism had previously been limited in scope by consent decree requirements that neither the suppliers nor the buyers of musical compositions

would be subject to exclusive dealing restraints. 15/ Even so, the Court remanded the case to the Court of Appeals with instructions that it should be subjected to a "discriminating examination under the rule of reason", noting that the particular practices employed might not survive that examination (at 24).

Nothing in BMI suggests that the Court has dispensed with the need to evaluate less restrictive alternatives, or weigh anticompetitive against procompetitive effects. This is made clear by

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15/ The Court of Appeals has thus drawn an inapposite fact parallel. In BMI, the creation of the joint marketing agency corresponds to the creation of Atlas as a joint agent for the carrier agents and other moving and storage firms. In BMI additional restraints such as exclusivity requirements had been abandoned, and that was taken by this Court to indicate some likelihood that the core integration was not, as modified, excessively broad. In this case, it is the extension of the core integration by means of exclusive dealing arrangements and additional restraints which is at issue.

the Court's subsequent opinion in Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982), where the Court found the restraint in question unjustified in large part because the proffered efficiency justification could have been achieved in a less restrictive way. See also National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).

The Court of Appeals method of analysis converts the BMI injunction that degrees or types of claimed reasonable necessity be given discriminating examination into a carte blanche for any restraint claimed to be subsidiary and collateral to a contractual integration which itself is "not of a size" to violate the Sherman Act.

By characterizing restraints claimed to be "ancillary" to a "contract integration" prior to rather than after a deter-

mination whether the restraints are unnecessarily broad, the appellate panel's opinion would curtail the reach of the antitrust laws in scarcely less sweeping a fashion than that achieved by its mode of market analysis. When the two lines of logic are combined, little short of outright monopolization or "naked" price fixing and territorial allocation would seem proscribed. A trade restraint justified by associated with some form of "contractual integration" would, absent a monopoly position among the proponents, seem largely exempt from challenge. Such a major change in antitrust analysis should be reviewed by this Court.

The unwillingness to consider less restrictive alternatives becomes particularly important where, as here, several alternative approaches might be used to deal with the type of justification advanced for the restraint.

3. SUSTAINING A "FREE RIDER" JUSTIFICATION ON MOTION FOR SUMMARY JUDGMENT MERELY ON FINDING OF SOME BENEFITS TO A CLASS OF POTENTIAL COMPETITORS, WITHOUT TAKING ACCOUNT OF RECIPROCAL BENEFITS TO THE PARTIES IMPOSING THE RESTRAINTS, A PRICE MECHANISM FOR EQUILIBRATING BENEFITS AND BURDENS, AND FACTUAL DISPUTE AS TO NET BENEFIT AND BURDEN, WOULD PROLIFERATE SPURIOUS FREE-RIDER CLAIMS.

This Court has recognized the potential applicability of the "free rider" market imperfection as a justification for trade restraint. E.g., Continental T.V., Inc., supra, at 55, citing Posner, Economic Analysis and Law, Brown & Co., 1971, at 285. However, this Court has not articulated a standard for judging free rider justification claims.

None of the justifications which Atlas advanced when it published its carrier agent policy (PSGI 54) clearly asserted that Atlas sought to terminate free riding. Petitioners contested these various Atlas justifications. As to claimed benefits of affiliation with

Atlas, Petitioners had discriminately granted some claimed benefits and disputed others. (PSGI 25-29, and attachments)

The Court of Appeals in effect reduced and transformed various justications for the "carrier agent" restraints, contested at the District Court level, into one: termination of "free riding" by independent carrier operations on advantages of agent affiliation with Atlas. (App. 5a) The opinion appears to adopt Atlas' arguments that Atlas would incur increased liabilities from independent carrier operations, though petitioners had shown that such liabilities had historically been miniscule, as to firms supplying 35% of Atlas' revenues. It also seemed to adopt the contested Atlas suggestion that independent carrier operations would utilize Atlas facilities, notwithstanding defendants'

own statement of facts and other prior cited materials which negate the possibility that "agents" would in their independent operations use Atlas facilities to any appreciable extent.

The Circuit Court found (App. 23a-25a) that the plaintiffs "could not seriously contend that the carrier agents' association with Atlas did not provide them with benefits that benefitted them in conducting business in competition with Atlas". The specifics used by the court were "intangible" benefits -- association with Atlas "national image", exposure to "national accounts" at Atlas sales meetings, and superior services from Atlas affiliates from Atlas training of their employees.

This sort of free riding analysis fails in taking no account of undisputed evidence showing substantial countervailing benefits to Atlas from its asso-

ciation with the carrier agents. The analysis also fails to take into account the availability of pricing mechanisms which compensate Atlas for its core services and which are or can be used to provide Atlas compensation for its supplementary (driver training, sales aids, sales convention) services. And the availability of alternative means of preventing any potential free riding is not addressed.

Plaintiffs showed that Atlas was formed in part by "carrier agents". A claim of free riding is belied by the "carrier agents" disproportionate contribution of bookings and hauling capacity for Atlas registered shipments. Atlas' market presence and reputation is necessarily derived in part from the market identities built in local and intrastate operations by agents and "carrier agents," and by their performance of the

physical aspects of the interstate movements. Atlas officers were acutely aware that Atlas gained substantially from the name-recognition goodwill generated by such local and regional companies, in their own operations -- including local, intrastate, and interstate operations. (PSGI 58 and Atlas President Bland's statement, supra.) Atlas has not contended and cannot contend that it has in any direct or traceable way compensated the carrier agents for this goodwill. Indeed, Atlas made forced contribution of the commercial reputations of the carrier agents exclusively to Atlas a cornerstone of its carrier agent policy, reflecting the major market value of this asset. 16/

16/ That Atlas attempt to appropriate the market value of these assets to itself by means of collective restraints denying independent use of the assets, rather than purchasing the carrier agent firms and paying the unrestrained market value

Thus, in the net, Atlas and the carrier agents mutually exchanged both tangible and intangible, priced and unpriced benefits. In taking account of only one side of the exchange of "intangible" benefits, the Court of Appeals made a fundamental error, of considerable precedential importance.

Practical limitations on explicit, detailed pricing of all components of often-complex business relationships allow scope for "free rider" claims in a vast variety of situations. Such claims must be given strict scrutiny E.g., General Leaseways, supra. A form of analysis which sustains "free rider" justifications for trade restraint upon showing some benefits to a contracting party which are not explicitly compen-

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of this asset, is one indicator of the unreasonable nature of the Atlas restraints.

sated, without regard to benefits flowing the other way, and without regard to alternative means of controlling "free rider" effects, incorporates a bias permitting an enormous variety of unnecessarily broad trade restraints arguably attendant to "contract integrations."

CONCLUSION

Rarely does a Court of Appeals combine three distinct forms of analytic error which have a common and major precedential effect -- substantial abridgment of the scope of the antitrust laws.

A rule that group boycotts clearly targeting horizontal competition are to be *per se* legal should less than 10% of a national market be directly restrained contradicts precedent and should surely be reviewed by this Court. A reinterpretation of the fundamental ancillary restraints doctrine which omits tests of reasonable necessity is hardly less con-

sequential or less demanding of review. And counting "free-rider" effects in only one direction would afford spurious justification for hosts of trade restraints.

All these errors prejudice the emergence of competition in a trade sector long cartelized by now-discarded regulations, and if not corrected will have mischevious effects throughout the economy in the decades ahead.

Respectfully submitted,

C. Jack Pearce